Office-Supreme Court, U.S.
FILED
MAY 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1350

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. The petition in this case presents three questions, the third of which is whether respondents' claim that the government failed to inspect adequately the installation of a gas heater in an airplane is barred under 28 U.S.C. 2680(h) as a claim arising out of misrepresentation.[1] See *United States* v. *Neustadt*, 366 U.S. 696 (1961). On March 7, 1983, this Court held in *Block* v. *Neal*, No. 81-1494, that Section 2680(h) bars only claims of injury based on a plaintiff's reliance on misinformation and not all claims that derive from negligent inspections. Thus, to the extent that respondents did not rely upon the FAA's certificate itself as the basis

[1]On the same day we filed our petition in this case, we also filed a petition in *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, No. 82-1349, which presents the same issues. We have suggested that *Varig Airlines* should be held pending the disposition of this case.

for their claims (which presumably would include the passengers), their claims are not barred by Section 2680(h), as interpreted in *Block* v. *Neal*.[2]

This Court in *Neal*, however, stressed (slip op. 5) that two additional, important issues were left undecided by that decision: whether a claim based on an inadequate inspection satisfies the requirements of the good samaritan doctrine so that liability may be imposed on the government as if it were a private person (see 28 U.S.C. 2674), and whether such a claim is barred by the "discretionary function" exception to the Federal Tort Claims Act in 28 U.S.C. 2680(a). Those issues are squarely presented in this petition and their resolution is, if anything, more critical in light of the Court's construction of the "misrepresentation" exception in *Neal*.

Respondents attempt (Br. in Opp. 4-5) to minimize the significance of the decision below holding the United States liable for this plane crash by asserting that they "assume" that each regulatory inspection case will be decided on its own "law, regulations and facts." But respondents do not indicate how the ruling that the United States is liable here can be limited to FAA inspections.[3] As we indicated in our petition (Pet. 10-11), the United States' exposure to liability

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[2]We note in this regard that respondent Varig in No. 82-1349 makes a special point (82-1349 Br. in Opp. 7, 9) of indicating that it did rely specifically on the certificate as the basis for its decision to buy the plane. Thus, it could be argued that Section 2680(h), as interpreted in *Neal*, does bar respondent Varig's claim for the loss of the plane itself.

[3]The court of appeals' decision has already been relied upon by other lower courts in FTCA cases involving claims other than FAA negligence. See, *e.g.*, *General Public Utilities Corp.* v. *United States*, 551 F. Supp. 521, 528 n.6 (E.D. Pa. 1982) (Nuclear Regulatory Commission inspection); *Gail Merchant Irving* v. *United States*, No. 81-501-D (D. N.H. Mar. 22, 1983), slip op. 5-7, 9 (OSHA inspection).

is enormous because the government engages in comparable regulatory activities with regard to virtually every industry engaged in interstate commerce.[4]

2. Nor have respondents been able to explain away the conflict in the circuits regarding the requirements of the good samaritan doctrine as applied to the United States' regulatory activities. As we pointed out in the petition (Pet. 15-19), the First, Sixth and Eighth Circuits all have required proof that the injured party relied specifically on the government's allegedly negligent conduct and not merely generally on the notion that the government regulates safety in the particular industry affected. See *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1148 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978); *Raymer* v. *United States*, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Gelley* v. *Astra Pharmaceutical Products, Inc.*, 610 F.2d 558, 561 (8th Cir. 1979). After we filed the petition, the Eleventh Circuit reached precisely the same conclusion, holding that the absence of proof that the plaintiff had relied on or even had knowledge of the existence of the FAA's particular regulatory activity at issue in that case was fatal to his claim under the good samaritan doctrine. See

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[4]Respondents suggest (Br. in Opp. 4-5) that if the decision creates a problem for the United States it is for Congress or the administrative agencies to correct. But the issue is whether Congress clearly intended to waive sovereign immunity in this situation when it enacted the FTCA. We submit that Congress could not have intended to subject the federal government's administrative inspection programs to judicial scrutiny through the medium of tort litigation, or to expose the federal treasury to suits involving literally billions of dollars in liability. Thus, Congress' power to amend the FTCA does not obviate the necessity for respondents to show clearly that Congress waived the United States' sovereign immunity for these claims in the first place.

Sellfors v. *United States*, No. 80-7897 (11th Cir. Feb. 16, 1983), slip op. 1670.[5]

Respondent argues (Br. in Opp. 7-8) that there is no conflict because the issue is a factual one; the courts cited above simply failed to find proof of reliance while the court of appeals here found that respondents had relied on the government's actions. But this response ignores the *legal* standard employed by the court below in finding that respondents had relied on the FAA's safety inspection. The court of appeals did not require specific reliance on the issuance of the supplemental type certificate, as the other courts would have; it held that liability was established solely because "the government reasonably could expect that members of the public would rely on the government's certification of airworthiness" (Pet. App. 4a). This conclusion is thus dependent on a legal standard that has been rejected by several other courts of appeals. Accordingly, the recurring issue of what type of reliance is required in order to hold the government liable under the good samaritan doctrine for negligence in its inspection programs warrants review by this Court.[6]

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[5]The court of appeals in *Sellfors* also rejected the argument that the United States was liable under the FTCA for its failure to enforce compliance with contractual assurances provided by federal grant recipients under the Airport and Airway Development Act of 1970, 49 U.S.C. 1701 *et seq.* "The legislative history [of the AADA] shows no intent to impose a legal duty on the FAA, running to each user of a federally funded airport, to insure the absolute safety of each facility constructed or maintained with federal funds." Slip op. 1668.

[6]Respondents argue (Br. in Opp. 6-8) that the requirement of the good samaritan doctrine that the defendant perform a service on behalf of the plaintiff is satisfied here because the United States has "preempted" the field of inspection and certification of safety in aviation. This is incorrect. The FAA does not assume sole or even primary responsibility for the safety of aircraft. That responsibility remains at all times on the manufacturers, owners and operators of the aircraft. See 14 C.F.R. 21.33(b)(1). The FAA's responsibility is a governmental one, running to the general public.

3. Respondents contend (Br. in Opp. 8-10) that the court of appeals was correct in finding that the inspection was an operational task and therefore not within the "discretionary function" exception to the Federal Tort Claims Act in 28 U.S.C. 2680(a).[7] But respondents completely ignore the argument presented in the petition. Our submission (Pet. 13-20) is that the court of appeals erred in focusing solely on the FAA's inspection of this single gas line in this single airplane in concluding that the agency was engaged in an operational task not within the exception; such a holding assumes that the FAA undertook the responsibility to find *every* defect in *every* airplane that flies over our airspace. In other words, the court in essence has held that the government guarantees the safety of every plane it certifies.

In fact, the FAA adopts specific regulations only to ensure that the groups it regulates—aircraft manufacturers, operators and owners—will make certain that the airplane over which they have primary control will comply with minimum safety standards. The airline was negligent in operating an aircraft that failed to satisfy FAA safety standards; yet respondents would force the federal government to compensate them for their losses due to this negligence because the FAA did not discover the defect and demand that the airline or a previous owner correct it. Respondents' contention and the decision below would require the FAA to change dramatically its regulatory function from that of a policeman to that of a mechanic or a

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[7]Respondents suggest (Br. in Opp. 9) that the government may have waived the "discretionary function" argument by not raising it during the first appeal of this case in the Ninth Circuit. Respondents did not assert waiver in the court of appeals and the court below considered the issue as properly presented. Moreover, the issue of whether respondents' claim for damages against the United States is barred under Section 2680(a) is jurisdictional and therefore may be raised at any time. Fed. R. Civ. P. 12(h)(3).

repairman.[8] No decision of this Court has ever construed Section 2680(a) to permit such judicial modification of an agency's regulatory role. It is only when the government assumes responsibility for the safety of specific individuals, such as by operating a lighthouse or a control tower,[9] that this Court has held that there is no discretion to fail to protect those who reasonably rely upon the action of government employees. These cases thus do not control this one. See *George* v. *United States*, No. 82-1321 (4th Cir. Mar. 24, 1983), slip op. 3-6 (applying 'discretionary function' exception to uphold dismissal of FTCA claim challenging FAA's approval of aircraft design and issuance of type, production and airworthiness certificates).

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[8]That respondents have misconceived the FAA's role in aviation safety is demonstrated by their reliance (Br. in Opp. 5) on *Dahms* v. *General Elevator Co.*, 214 Cal. 733 (1932), as an analogous case under California state law. In *Dahms*, the defendant had contracted with the plaintiff's employer to maintain and repair the elevator that fell and injured plaintiff. The FAA's inspections, which are designed to protect the public safety, are in no way comparable to inspections by a private company that contracts to guarantee the safety of a particular piece of equipment.

[9]See *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955); *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), aff'd, 350 U.S. 907 (1955); *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967).

CONCLUSION

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MAY 1983

DOJ-1983-05

SEE COMPANION CASE